Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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NICOLAS SLTARIS, ET AL.,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondant,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

This case raises two questions. First, does the Fourth Amendment protect the security of a passenger riding in a vehicle illegally stopped by the police, thereby, permitting a passenger to challenge the constitutionality of the police search of an area in the vehicle where the passenger has stored his personal belongings?

Second, are acts consistent with a "narcotic trafficker profile" sufficient in themselves to establish probable cause to arrest and search?

## PARTIES TO THE PROCEEDINGS

In addition to the party shown in the caption of this case, Jose Gonzalez-Perez was an appellant below and a Petitioner herein.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Petitioners, Nicolas Saltaris and Jose Gonzalez-Perez, respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit in this case.

## I

## OPINIONS BELOW

The Ninth Circuit Court of Appeal's

memorandum opinion filed May 19, 1994, is unreported. A copy is attached hereto as exhibit A, to the Appendix. The District Court did not file an opinion.

## II

## JURISDICTION

On May 19, 1994, the court of appeals entered its judgement. The Jurisdiction of this court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

## III

## RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## IV

## STATEMENT OF THE CASE

A. JURISDICTION IN THE DISTRICT COURT

The District Court had jurisdiction pursuant to 18 U.S.C. §3231 because the indictment charged Mr. Saltaris and Mr. Gonzalez-Perez with offenses under Title 21 of the United States Code.

B. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

1. ***Charges***

On February 2, 1992, an indictment was filed naming the Mr. Saltaris and Mr. Gonzalez-Perez and others as defendants charging various counts. Count One alleged a conspiracy to possess and distribute a

controlled substance (cocaine), a violation of Title 21, United States Code, Section 846; Count Two charged the Petitioners with possession with intent to distribute a controlled substance (cocaine), a violation of Title 21, United States Code, Section 841(a)(1); and, Mr. Saltaris was charged with carrying a firearm in the commission of a drug trafficking crime a violation of Title 18, United States Code, Section 924(d).

2. ***Facts***

On January 22, 1992, at approximately 4:00 p.m. City of Ontario police officers assigned to a narcotics task force commenced surveillance at the Holiday Inn in the City of Ontario. The surveillance continued into January 23, 1992. On January 23, 1992, at approximately 11:30 a.m., officers observed Mr. Saltaris and a Mr. Dionison Vasquez drive a tractor

trailer from the Holiday Inn and drive approximately three miles to the "Truck Stops of America" truck stop. After a lapse of approximately two hours the truck driven by Mr. Vasquez with the Mr. Saltaris as a passenger left the truck stop and drove to a "Motel 6" motel located at 1560 E. 4th Street in the City of Ontario.

The police saw Mr. Saltaris after his arrival at the Motel 6 more than once walk around the parking lot and the surrounding area. Police also saw him make several telephone calls from the public telephones in the motel parking lot. While the Mr. Saltaris used the telephone the police claim that he constantly looked around.

Some time later according the declarations, Mr. Vasquez left his room and placed telephone calls from the pay telephone at the Motel 6 parking lot. Vasquez also constantly looked around while

using the telephone.

About an hour later, Mr. Saltaris left his room, walk through the parking lot and walked northbound across Fourth Street. He walked to the Travel Lodge Motel and immediately walked out. He continued to walk down Fourth street, and entered the farthest east door of the Travel Lodge and again immediately exited. He then walked back toward the Motel 6. While Mr. Saltaris was walking, he appeared to be looking around. While crossing Fourth Street he stopped in the middle of the street, watched traffic pass by him for ten to fifteen seconds, and then completed crossing the street. Mr. Saltaris then returned to his room.

About an hour later Mr. Saltaris left his room and made a phone call at the public phone. After making the telephone call, he went to Mr. Vasquez' room for a

few minutes. Mr. Saltaris left Mr. Vasquez' room and walked to a nearby fast food restaurant, bought some food, and returned to his room.

Later that evening the police saw Mr. Vasquez leave the motel in a taxi. He returned about thirty minutes later driving a Nissan Sentra automobile. After getting out of the Nissan, Mr. Vasquez went to Mr. Saltaris' motel room. Mr. Vasquez spoke to Mr. Saltaris, left Mr. Saltaris' room, and, went to the Nissan. Both proceeded to remove five plain and sealed cardboard boxes from the Nissan Sentra and place them in the cab portion of the tractor. Both men returned to their respective rooms. Mr. Vasquez retrieved a sports bag and walked back to the Nissan Sentra. He open the driver's door then closed it. He next placed his sports bag in the cab of the tractor. Mr. Saltaris left his room with

his luggage, placed it in the cab of the truck. Mr. Vasquez then drove the truck out of the parking lot of the Motel 6.

The police followed the truck to the "Truck Stops of America" truck stop. The police blocked the truck after it stopped. They then arrested the Mr. Saltaris and Mr. Vasquez.

Immediately after the arrest the truck's cab was searched and the cardboard boxes were opened. Inside police found a total of one-hundred and thirty kilograms of cocaine Hydrochloride. Inside a zippered bag that the police saw Mr. Saltaris carry out of his motel room into the truck's cab, the police found a 9mm pistol belonging to the Mr. Saltaris.

At approximately 9:00 p.m. on January 23, 1992, Agent Moore, an investigating officer, returned to area of the Motel 6 parking lot.

At approximately 10:15 p.m. Agent Moore saw Leon Valencia and Jose Gonzalez-Perez approach the Nissan Sentra. The men walked around the Nissan Sentra once looking around in the area. They stood next to the car for a moment then Mr. Valencia got in the car. Mr. Valencia started the car and drove it west on Fourth Street. A marked police patrol car followed it on Fourth Street.

Meanwhile, Mr. Gonzalez-Perez walked back in the direction from where he came. He walked to the right on Fourth Street away from the direction of the Nissan. He increased his pace and then looked back. Then in a near run he crossed Fourth Street as he continued to look in the direction of the Nissan being followed by the marked police car.

Officer Moore told another uniformed police officer to arrest Mr. Gonzalez-

Perez. The police stopped him and patted him down for weapons. During the search officer Moore found a wallet, two thousand dollars in cash, a plane ticket from New York and New York identification. The police handcuffed Mr. Gonzalez and put him in the back of the police car.

C. *REASONS FOR GRANTING THE WRIT*

1. Passenger's Right of Privacy

This case presents the Court with the opportunity to clarify if the passenger of a motor vehicle has a right of privacy interest in an area of a vehicle where he has stored his personal belongings, and when the police have illegally arrested him. The majority in *Rakas v. Illinois*, 439 U.S. 128 (1978), did not address this factual scenario, yet, it is an area of growing concern as motorist and their guests travel the highways of this country. Do only those persons who have dominion and

control of a vehicle enjoy the protection of the Fourth Amendment's prohibitions against unreasonable searches and seizures? If the guest of an owner/motorist puts his or her luggage in a container of a car, does that person's expectation of privacy in that area unreasonable so that society will not recognize it? *See, Katz v. United States,* 389 U.S. 347, at 361.

The court of appeal's decision denying standing to challenge the search of the truck's cab indicates that under its understanding of *Rakas v. Illinois, id.,* such a subjective expectation of privacy is unreasonable. Its applicaton of the decision in *Rakas v. Illinois, id.,* means that passenger's are required to prove that "[they] had joint control of the vehicle", or an "interest in the seized [items]," before they would enjoy the right to be free from unreasonable governmental

intrusion. [Appendix 9-10].

The court recognized that while Mr. Saltaris "was not the owner of the truck and was observed merely riding as a passenger, the record [did] show that the truck was his only mode of transportation for the period of the surveillance, that he had put his personal belongings in the truck, and that officers found a log book in the cab showing that he had driven from the east coast with [owner/operator] Vasquez." [Appendix 9.]. These facts, however, according to the courts reasoning were in effect irrelevant because they did not prove dominion and control over the truck, or a possessory interest in the boxes containing the cocaine.

The court of appeals also relied on the Tenth Circuit decision in *United States v. Jefferson*, 925 F.2d 1242, 1248-51 (10th Cir.) *cert. denied*, 112 S.Ct. 238 (1991),

which held that a non-owner passenger who assisted in driving the car cross-country, at times even sleeping in the car, but who did not assert a privacy interest in the items containing the contraband seized by police, lacked standing to challenge the search. However, the defendants in *Jefferson, id.*, did not claim to have placed any of their luggage in the truck of the car where police found the narcotics. In addition, like the defendants in *Rakas, id.*, the defendants in *Jefferson, id.*, did not contest the legality of their seizure.

The court of appeal's denial of a privacy interest to a passenger who did not have dominion and control over the truck does not inevitably follow under *Rakas, id.* The Court in *Rakas, id.*, 142-43, only rejected the concept that the Fourth Amendment confers a privacy interest in the area searched merely because the person is

"legitimately on the premises." This Court held that passengers in a lawfully seized car do not, solely by virtue of their lawful passenger status, have standing to object to a police search of the automobile.

In its reasoning the majority by analogy commented that a "casual visitor who has never seen, or been permitted to visit the basement of another's house" could not object to the basement's search. *Rakas v. Illinois, id.,* at 142. However, at footnote 11, the majority stated:

> This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search. *id.,* fn. 11, at 143.

In addition, the concurring opinion of Justice Powell, with which Chief Justice

Burger joined, pointed out that the defendants there did not challenge the constitutionality of the police action in stopping the automobile in which they were riding, nor did they complain of being made to get out of the vehicle. 439 U.S. at 151-52. "The question before the court, therefore, [was] a narrow one: Did the search of their friends automobile after they had left it violate any Fourth Amendment Right of the Petitioners?" *Id.*, 439 U.S. at 152.

However, here Mr. Saltaris established more than the mere status of passenger. He was not a mere casual guest of the owner/operator. He had driven in the truck cross-country, he had unlike the defendants in *Rakas v. Illinois, id.*, stored his personal belongings in the cab of the truck demonstrating a privacy interest in the cab area. Also unlike the defendants in *Rakas*

*v. Illinois, id.*, Mr. Saltaris did challenge the legality of the initial stop and arrest. In addition, the government's officials searched his personal belongings found in the area in which the boxes were located. Unlike the *Rakas v. Illinois, id.*, defendants, Mr. Saltaris did demonstrate a privacy interest in the area searched.

The court of appeal's requirement that Mr. Saltaris produce evidence of "joint control of the vehicle" in order to establish a privacy interest in the cab portion of the vehicle, runs counter to this Court's pronouncements that the "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."

*Mancusi v. DeForte,* 392 U.S. 364, 367(1968), citing *Katz v. United States,* 389 U.S. 347, 352 (1967). The court of appeal's decision also runs counter to this Court's pronouncement that the Amendment's shield is not limited to those persons who have "dominion and control" over the area intruded by the government. *See, Minnesota v. Olson,* 495 U.S. 91 (1990). The *Olson, id.,* majority stated that it did not understand *Rakas,* id., "to hold that an overnight guest can never have a legitimate expectation of privacy except when his host is away and he has a key, or that only when those facts are present may an overnight guest assert the `unremarkable proposition,' *id.,* at 142, 99 S.Ct., at 430, that a person may have a sufficient interest in a place other than his home to enable him to be free in that place from unreasonable searches and seizures." *Olson,*

*id.*, at 98.

While *Rakas v. Illinois, id.*, clearly stated that a person who merely establishes their status as a passenger in a vehicle without more is not entitled to a reasonable expectation of privacy in a vehicle, the Court's decision in *Olson, id.*, establishes that the *Jones v. United States*, 362 U.S. 257 (1960), type of "dominion and control" is not essential. The court of appeal's decision here failed to recognize that a passenger has a right to challenge his seizure and the search and seizure of an area in which he had stored his own property and thus manifested an expectation of privacy.

The court of appeal's application of this court's decision in *Rakas v. Illinois, id.*, is too narrow and its continued application in such a manner will deprive countless persons who are passengers in a

motor vehicle a reasonable expectation of privacy. In essence only those who have dominion and control over a motor vehicle will be protected, while everyone else will be denied such protection even in those areas to which they have manifested an expectation of privacy by placing their personal effects therein. Is this broad denial of the protection of the Fourth Amendment reasonable given the everyday occurrence of multiple person occupied vehicles? The Petitioner suggests that the answer should be "no."

2. The Probable cause issue.

The use of profiles in narcotic investigations to establish probable cause for arrest is an evolving question in the law. This case provides the court with an opportunity to determine if patterns of activities observed by trained police officers without other information that a

crime has occurred or is about to occur is sufficient in itself to establish probable cause to arrest and to search.

Historically Courts have permitted police to temporarily detain a person for investigation when police see a pattern of activity consistent with crime. However, historically the Court has been hesitant to find that ambiguous behavior provides probable cause even though trained and experienced police officers have claimed the expert ability to discern criminal conduct from seemingly innocent actions.

In *United States v. Mendenhall,* 446 U.S. 544 (1980)(the defendant was stopped because she fit such a profile. The Court found that the police conduct did not constitute an impermissible seizure. However, there was no suggestion that the police conduct was justified by probable cause to arrest.

In *Reid v. Georgia*, 448 U.S. 438 (1980), the defendant was stopped because she arrived early in the mourning from a known drug center, tried to conceal the fact she was traveling with another, and had no luggage other than a shoulder bag. (*id.*, at 441). The Court concluded the drug courier profile did not justify even a detention. (*Ibid.*)

In *Florida v. Royer*, 460 U.S. 491 (1983), the defendant fit a drug courier profile and was stopped by the police. The police effectively compelled him to accompany them to a large storage room and has his luggage brought there. He "consented" to a search of the bags, where bags were found. (*id.*, at pp. 493-495.) The Court held that the entire encounter was not consensual, the defendant's custody exceeded the bounds of temporary detention, and there was no probable cause to arrest

him. (*Id.*, at pp. 501-507).

Finally, in *United States v. Sokolow*, 490 U.S. 1, the defendant paid cash for two round trip airlines tickets from Honolulu to Miami, a source city for narcotic activities. He travelled under an assumed name, stayed in Miami for only 48 hours after a twenty hour flight, did not check any luggage and appeared to nervous during the flight. (*Id.*, at p.3.) The Court found Sokolow's conduct created a reasonable suspicion criminal activity was afoot, justifying a brief detention. (*Id.*, at p.11.) However, this Court never suggested there was probable cause to arrest or search before a narcotic sniffing dog was employed. (*Id.*, at pp. 5-11.)

The wisdom gained from these cases is that a "profile" which allows expert narcotic agents to discern ambiguous conduct as narcotic activity will justify

detention but not an arrest or search. The drug courier profile in the above mentioned cases is indistinguishable from the drug conspiracy profile which includes the use of pay phones, looking around, the use of an alias, and the transportation of boxes (the contents that the police had no information).

Here as in *Florida v. Royer, id.*, 460 U.S. 491, 502, the police observations of suspicious activity, use of pay telephones and other activities support a reasonable suspicion of narcotic activity. If the officers had merely stopped Mr. Saltaris and the driver to confirm or dispel their suspicions and the detention produced facts sufficient to constitute probable cause, the search would be justified.

"Reasonable suspicion" and "probable cause" are both standards which are not determined on a bright line rule. (*United*

*States v. Sokolow, supra,* 490 U.S. 1, 7-8; *Illinois v. Gates,* 462 U.S. 213, 232 (1983)) But, the requirement of probable cause to arrest or search has not been diluted by the recognition that less intrusive stops may be conducted on information and belief not rising to the level of probable cause. (*Terry v. Ohio,* 392 U.S. 1, 19 (1968). The Court has never held facts which merely constitute reasonable suspicion may support the arrest of a person or the issuance of a warrant.

Probable cause has been defined as "[t]he quantum of . . . --evidence which would 'warrant a man of reasonable caution to in the belief' that a felony has been committed * * *--must be measured by the facts of the particular case. *Wong Sun v. United States,* 371 U.S. 471, 479 (1963). Probable cause is not an exact concept, it is certainly more than rumor, hunch,

curiosity, or even a "strong reason to suspect." *Henry v. United States,* 361 U.S. 98, at 101 (1959). (Emphasis added).

The Fourth Amendment requires that a determination of probable cause be based on objective facts. *Beck v. Ohio,* 379 U.S. 89 (1964). The reviewing court must be provided sufficient facts from which he may draw the inference and form the conclusions necessary to a determination of probable cause. *Giordenello v. United States,* 357 U.S. 480, 485-86 (1958). The court may not simply rely upon the conclusions of a person. Mere conclusions will not suffice. *Whitely v. Warden,* 401 U.S. 560 (1971).

In reviewing the facts to determine the presence or absence of probable cause, the courts do not accept the bald conclusions of the police. They must exercise independent judgement of whether sufficient facts are present to establish

probable cause. *Illinois v. Gates,* 462 U.S. 213 (1983). In doing so the courts will look to determine if the police had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that the person arrested had committed or was committing a crime. *Wong Sun v. United States,* 371 U.S. 471 (1963).

This court in *Beck v. Ohio,* 379 U.S. 89, 96 (1964)), expressed concern regarding after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar short comings of hindsight judgement. The police characterizations of the observed events here aptly demonstrate the need for the courts to continue to be concerned about after the fact justifications for an arrest by the police.

a. Mr. Saltaris Arrest.

In the arrest of Mr. Saltaris, the Court of appeal decided that the arresting officers had probable cause to arrest the occupants of the truck because they knew that Mr. Saltaris was a former Drug Enforcement Administration (hereinafter "DEA") informant who had registered at a motel under a different name, had observed Mr. Saltaris and the truck driver engage in activities consistent with narcotic trafficking (the use of pay phones and the apparent walking around of Mr. Saltaris), had observed Mr. Saltaris and the truck driver load the boxes from a car to the cab of the truck, and, had seen the truck's occupants with their luggage leave immediately after the boxes had been loaded in the cab and leaving the car behind. [Appendix 17-18].

However, declarations filed in

opposition to the motion to suppress evidence are replete with conclusions based on hindsight. First, Officer Nicko Carcich claims in his declaration that he had been told by another officer that Mr. Vasquez and Mr. Saltaris had been staying at the Holiday Inn in the City of Ontario from January 18, 1992 and had been extending their stay on a daily basis. Paying cash for their room. There is no basis for giving this alleged information any credence. There is no indication from where this information came. Is it based on rumor, speculation, or from having spoken to the management of the Holiday Inn? One can only speculate. This is a bare conclusion that the trial court had no basis for crediting as reliable. The only things the court could consider to be reliable are the observations factually establishing that Mr. Vasquez and Mr.

Saltaris were staying at the Holiday Inn on January 22, 1992.

The officers commenced surveillance on the afternoon of January 22, 1992. It continued into January 23, 1992. However, the court could not reliably credit the hearsay information that the truck and tractor were parked at the Holiday Inn for a period of five days. There simply were no facts serving as a substantial basis for crediting the hearsay. *See, Jones v. United States,* 362 U.S. 257, at 269 (1960)(substantial basis for crediting hearsay must be presented). There is also no basis for crediting the officer's claim that the rooms were paid for in cash. Even if the rooms had been paid for in cash, there is no claim that truck drivers normally do not pay for their expenses in cash. Therefore, no sinister inference could be drawn form that fact.

The police declarations claim that Mr. Saltaris used a false name. He used the name Nick Zata. However, apparently Mr. Saltaris was not attempting to evade detection of his identity. He gave the Holiday Inn his true Driver license number. From his true driver license number the police did find out his true name. It is not logical to conclude that Mr. Saltaris was trying to conceal his identity from law enforcement if he gave his true driver license number to the Holiday Inn. Therefore, there was no reasonable basis for concluding that Mr. Saltaris was acting consistent with a criminal design when he used the name Nick Zata.

The police also claim that based on Mr. Saltaris identity they determined that he had been a Drug Enforcement Administration (DEA) informant. However, no significance was given by the court of

appeals about how this fact contributed to probable cause.

In essence what the district court was left with the observations of the officers on January 22, 1992 and January 23, 1992. However, these observations were of ambiguous activities. The police infused into the observed activities a gloss of criminality to vindicate an arrest that was based on a reasonable suspicion, but not on probable cause.

While the court of appeals characterized the transfer of boxes from the Nissan automobile to the truck as a "car switch," such a description in itself presupposes that the boxes contained narcotics. However, unlike the "tied balloon" in *Texas v. Brown*, 460 U.S. 730, 742-43 (1983), which "spoke volumes as to its contents," nothing articulated that the boxes here themselves were in any way

uniquely consistent with the packaging of narcotics. Nor is the transfer of boxes into the truck's cab uniquely consistent with narcotic trafficking.

In addition, Mr. Vasquez did not engage in evasive driving; nor, did Mr. Vasquez or Mr. Saltaris make pager type phone calls. In addition, the officers at the time of Mr. Saltaris' arrest had no knowledge as to the boxes' contents, or who gave them to Mr. Vasquez. There is no decision from this court holding that any one activity consistent with drug activity is sufficient to establish probable cause: especially without an informant's tip. Almost all cases where probable cause is found involve the presence of an informant's tip along with numerous observed activities that give veracity to the informant's information. *Illinois v. Gates,* 462 U.S. 213 (1983); *Draper v.*

*United States,* 358 U.S. 307 (1959). The officer's observations are merely corroborative. (See *Illinois v. Gates,* 462 U.S. 213, 233-35, 238 (1983); *United States v. Ocampo,* 937 F.2d 485, 490 (9th Cir. 1991); compare *United States v. Freitas,* 716 F.2d 1216, 1223 (9th Cir. 1983)[observations were insufficient to corroborate informant]. However, this court has not found probable cause to arrest solely on the observations of the police without some indication that the facts observed are uniquely consistent with the crime being investigated. *See, Texas v. Brown,* 460 U.S. 730, 742-43 (1983).

While the police had some spokes indicating possible criminal activity, they did not have a "hub" or a "rim" tying the circumstances together to establish a fair probability that a crime was occurring. Here the police had no information that

either Mr. Vasquez or Mr. Saltaris were drug dealers; they had no information that the boxes were loaded with cocaine or some other illegal substance; they had not seen either person on an occasion before this investigation in the possession of narcotics; and, they had no information as to the ownership of the Nissan and its relationship to either Mr. Saltaris or Mr. Vasquez. Without such information, the police had nothing more than the right to briefly detain to investigate the defendants' activities.

It is suggested that under the above circumstances the police did not have probable cause to arrest Mr. Saltaris and search the contents in the interior of the cab. This case does provide the Court with an opportunity to define when "drug profiles" may establish probable cause to arrest and search.

b. The Gonzalez-Perez Arrest.

The circumstances surrounding the arrest of Mr. Gonzalez-Perez provide this court with the opportunity to clarify to what degree a person must be connected to a crime committed by others to establish probable cause to arrest. As with the claim of Mr. Saltaris the issue here is whether the actions of Mr. Gonzalez-Perez observed by the police gave them only a sufficient bases for temporary detention, or was the information sufficient for the more invasive police action of arrest?

It is also suggested that this case provides the court with an opportunity to set forth to what extent the bald observations of the police may serve as sufficient basis to arrest as oppose to tempoarily detain a person for investigation.

There are no less than three Supreme

Court decisions suggesting that probable cause to arrest does not exist unless the information at hand singles out one individual." Wayne R. La Fave, *SEARCH AND SEIZURE, A treatise on the Fourth Amendment,* section 3.2, p. 587-88 (Second Edition 1987). In *Johnson v. United States,* 333 U.S. 10 (1948), the police entry into a room could not be justified on entry to arrest defendant, because the officer did not know that the defendant was the only occupant until after he entered. In *Mallory v. United States,* 354 U.S. 449 (1957), where the police arrested three men fitting the general discription in order to interrogate them, the court stated:

> Presumably, whomever the police arrest they must arrest on "Probable cause." It is not the function of the police to

> arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court held the arrest of the defendant "Toy" unlawful because there was no showing that the police "had some information of some kind which had narrowed the scope of their search to this particular "Toy." *Id.*, at 480-81.

Here the court of appeal held that the police arrest and search of Mr. Gonzalez-Perez conformed with the Fourth Amendment's probable cause requirement. The Court reasoned that in addition to seeing Mr. Gonzalez-Perez in proximity to a Mr. Valencia (the man who drove the Nissan automobile away), the police knew "that

'someone' involved in the conspiracy would be coming to pick up the load car. . . we believe that this information gave the officers reason to be highly suspicious of anyone who directly approached the car." [Appendix 19-20.]. This fact along with the police observation of Mr. Gonzalez-Perez circling and looking around carefully in the vicinity of the load car together with Valencia, and then Mr. Gonzalez-Perez break into a near run when a police car began to Valencia the court concluded gave the police probable cause to arrest. [Appendix 20-21.].

The information here was of a general nature, "someone" would come to pick the car up. However, the statement gives no clue that there is more than one person coming and does not identify Mr. Gonzalez-Perez as that person. The officers were merely looking for some person to come for

the car. Probable cause must be particularized with respect to the person seized. *See, Ybarra v. Illinois,* 444 U.S. 85, 93 (1979). However, here the police had no knowledge of Mr. Gonzalez-Perez relationship to that person. The only concrete observation not dependant on a subjective interpretation is that Mr. Gonzalez-Perez along with Mr. Valencia look around as they circled the car. However, it was Mr. Valencia that took the car. The police had no basis for concluding under these circumstances that they had probable cause to arrest as oppose to detain for questioning.

The court of appeal held that the handcuffing of Mr. Gonzalez-Perez and the searching of his person was justified only because the officers had probable cause to arrest. However, similar to the defendants in *Mallory v. United States, id.,* 354 U.S.

449, Mr. Gonzalez-Perez was arrested then searched to determine if he was involved. Having found evidence of an airline flight from New York, and two thousand dollars in cash, the police felt reasonably sure that Mr. Gonzalez-Perez was involved. However, this reasonable surety came after he had been arrested. Had the police not found the above items it would appear that an insufficient factual bases to arrest Mr. Gonzalez-Perez would have existed.

In Mr. Gonzalez-Perez' case the officers made an arrest based on a series of conclusions that are self serving. A sinister interpretation was given to each fact they observed although the totality of the observable facts were ambiguous at best, and perfectly consistent with innocent activity. *See, United States v. Strickler,* 490 F.2d 378, 380 (9th Cir. 1974). The declarations of the arresting

officers subjectively infused a criminal purpose to the observed activity beyond the capability of human perception. A criminal gloss was attributed to the observations to justify Mr. Gonzalez-Perez arrest.

It is suggested that the information available to the police at the time of Mr. Goonzalez-Perez arrest only justified a brief detention for questioning as established in *Terry v. Ohio,* 392 U.S. 1 (1968).

## CONCLUSION

For the foregoing reasons, the Petitioners pray that this Court grant Certiorari.

Dated: August 15, 1994.

Respectfully submitted,

Manuel U. Araújo,
Attorney for
Petitioners

# APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | NO.92-50643 |
| | ) | |
| Plaintiff - Appellee, | ) | D.C. NO. CR-92-98-JSL-4 |
| | ) | |
| v. | ) | |
| | ) | MEMORANDUM* |
| | ) | |
| DIONISIO VASQUEZ, | ) | |
| | ) | |
| Defendant - Appellant | ) | |
| | ) | |

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | NO. 92-50647 |
| | ) | |
| Plaintiff - Appellee, | ) | D.C. NO. CR-92-98-JSL |
| | ) | |
| v. | ) | MEMORANDUM* |
| | ) | |
| NICOLAS SALTARIS, | ) | |
| | ) | |
| Defendant - Appellant | ) | |

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | NO. 92-50661 |
| | ) | |
| Plaintiff - Appellee, | ) | D.C. NO. CR-92-98- |

EXHIBIT A

) JSL
)
V. ) MEMORANDUM*
)
JOSE GONZALEZ-PEREZ, )
)
Defendant - Appellant.)

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[1] Appeal from the United States District Court For the Central District of California J. Spencer Letts, District Judge, Presiding

Argued and Submitted December 7, 1993
Pasadena, California

Before: TANG, D.W. NELSON, and LEAVY, Circuit Judges.

Three of six defendants convicted of participating in a cocaine distribution conspiracy appeal their convictions. Dionisio Vasquez ("Vasquez"), Nicholas Saltaris ("Saltaris"), and Jose Gonzalez-Perez ("Gonzalez-Perez") were convicted of conspiracy to possess with intent to

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

distribute cocaine in violation of 21 U.S.C. S 841(a)(1), and Saltaris was found guilty of use of a firearm during commission of a drug trafficking offense in violation of 18 U.S.C. S 924(d). We affirm the convictions.

## FACTUAL AND PROCEDURAL BACKGROUND

On January 22, 1992, Nicko Carcich, an officer with the Ontario (California) Police Department on assignment with the DEA, learned that two male guests had arrived at the Holiday Inn in Ontario in a tractor-trailer on January 18, 1992, and, for four days, had not moved the truck from the hotel parking lot. Concluding that the four-day layover was inconsistent with the practice of most truck drivers, and that the men "might be involved in... narcotics trafficking, "Carcich and other officers began surveillance of the truck and the two men at noon on January 22.

The men were later identified as Vasquez and Saltaris. Saltaris had checked in to the hotel under an assumed name, but the police were able to identify him because he had given the hotel his proper driver's license number. Records showed that Saltaris previously had served as a DEA informant.

After two days of surveillance in which the men were observed leaving the Holiday Inn and checking-in at a nearby Motel 6, visiting a truck stop, making numerous telephone calls from pay phones, and repeatedly visually scanning the activities in and around the parking lot of the motel, the officers observed what they described as a "car switch." The officers first observed a taxi cab enter the Motel 6 parking lot. The taxi honked, Vasquez came out of his room and got in the taxi, and the taxi drove away. Mr.

Saltaris remained in his room but periodically opened the door or looked out the window. Roughly half an hour later, a Nissan Sentra driven by Mr. Vasquez arrived at the motel and parked next to the truck. Vasquez went to Saltaris' room and both returned to the Sentra where they proceeded to remove four cardboard boxes from the trunk of the Sentra, and a fifth box from the rear seat. The two men loaded these boxes, each roughly 18 inches square, into the cab of the tractor-trailer. they briefly returned to their rooms, each retrieving their belongings, then climbed into the truck and drove off. When the men arrived at the truck stop they had visited earlier in the day, officers arrested them and searched the cab of the truck. The officers immediately opened the five cardboard boxes, which were lying loose in the

sleeper portion of the cab, and discovered 260 packages of cocaine with a total wight of roughly 130 kilograms. The officers also found a handgun in Saltaris' sports bag, and a log book indicating that Vasquez and Saltaris had driven the truck together from the east coast.

Later that evening, Leon Valencia (not a party to this appeal) and Gonzalez-Perez were seen approaching the Nissan Sentra in the Motel 6 parking lot. The two men walked around the car, looking around as they did so. Valencia got in the car and began to drive away. Gonzalez-Perez walked to the street, and, looking in the direction of the Sentra, which was then being followed by a marked patrol car, hurried his pace to a near run as he crossed the street. A second marked police car intercepted Gonzalez-Perez. Police claim that Gonzalez-Perez was so

distracted that he nearly ran into another marked police car as he crossed the street. He was arrested and evidence was seized linking him to the conspiracy.

Shortly after the start of the trial, having lost his motion to suppress the evidence obtained as a result of the search of the truck, Vasquez chose to plead guilty to the charges against him, reserving his right to appeal the legality of the arrest and search. Saltaris and Gonzalez-Perez each were convicted after a jury trial.

## ANALYSIS

### I. PROBABLE CAUSE

All of the appellants claim that the officers lacked probable cause to make the arrests and conduct the searches. The appellants' claims raise four distinct issues: A) Does Saltaris have standing to challenge the search of the truck? B)

Should the district court have held an evidentiary hearing prior to denying Vasquez's motion to suppress? C) Did the district court err in determining that there was probable cause for the arrests of Vasquez and Saltaris and the search of the truck? D) Did the district court err in determining that there was probable cause for the arrest of Gonzalez-Perez in the vicinity of the load car? We discuss each of these issues in separate sections below.

A. Saltaris's Standing to Challenge the Search of the Truck

Standing is a question of law reviewed de novo. Ellis v. City of LaMesa, 990 F.2d 1518, 1529 (9th Cir. 1993) ; United States v. Kovac, 795 F. 2d 1509, 1510 (9th Cir. 1986). To establish standing to challenge the legality of a search or seizure, the

defendant bears the burden of proving that he had a "legitimate expectation of privacy" in the items seized or the area searched. United States v. Padilla, 113 S. Ct. 1936, 1939 (1993); Rakas v. Illinois, 439 U.S. 128, 143-44 (1978).

Saltaris claims that he had a legitimate expectation of privacy in the cab of the truck. He points to the fact that although he was not the owner of the truck and was observed merely riding as a passenger, the record shows that the truck was his only mode of transportation for the period of the surveillance, that he had put his personal belongings in the truck, and that officers found a log book in the cab showing that he had driven from the east coast with Vasquez.

Saltaris, however, produced no evidence that he had joint control of the vehicle, and disclaimed any interest in

the seized boxes. Accordingly, we conclude that Saltaris did not have standing to challenge the search and seizure of the boxes from the cab of the truck. See Rakas, 439 U.S. at 148-49 (holding that a "passenger qua passenger" does not have a legitimate expectation of privacy sufficient to confer standing to assert a Fourth Amendment challenge) ; United States v. Jefferson, 925 F.2d 1242, 1248-51 (10th Cir.) cert. denied, 112 S. Ct. 238 (1991) (holding that non-owner passenger who assisted in driving the car cross-country, at times even sleeping in the car, but who did not assert an interest in the items containing the contraband seized by police, lacked standing to challenge the search).

B. The District Court's Failure to Hold an Evidentiary Hearing

Vasquez claims that the district

court abused its discretion when it denied him an evidentiary hearing on his motion to suppress.[2] Vasquez contends that a hearing was essential to evaluate the conclusions drawn by the surveilling officers in their declarations in support of probable cause.

A trial court's decision whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. United States v. Mejia, 953 F.2d 461, 465 (9th Cir. 1991), cert. denied, 112 S. Ct. 1983 (1992). "An

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[2] We give no independent weight to the copy of the "Findings of Fact and Conclusions of Law" submitted to this court by the government. This document is nothing more than a copy of the proposed findings proffered to the district court by the Assistant U.S. Attorney after the government had prevailed on the motion to suppress. The word "proposed" has been roughly scribbled out, but the document is not signed by Judge Letts, and is stamped as having been filed with the district court on November 17, 1992, three months after the hearing on the motion to suppress and more than one month after all of the defendants had filed their notices of appeal with this court. Most significantly, the district court docket does not show that the district court ever approved these findings.

evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of [material] fact . . . are in issue." United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986).

Although Walczak requires the district court to hold evidentiary hearings in cases involving warrantless arrests or searches whenever there is any material factual dispute, Vasquez did not challenge the underlying facts. Instead, Vasquez argued that he should have had the opportunity to challenge the conclusions that the officers drew in their declarations. Two of the declarations merely recite what the officers observed. The third declaration, however, that of Special Agent Moore, makes a number of

assertions that are not based on his surveillance of the defendants, but on his claimed expertise in narcotics trafficking.

After stating his credentials (Moore reported having participated in some 200 cases involving surveillance of individuals suspected of transporting narcotics and having attended three training seminars on the use of commercial vehicles in the transport of narcotics), Moore asserted, for example, that "Commercial truck drivers do not stay in motels with their trucks parked idle for several days" and that "Commercial truck drivers do not register in motels under assumed names." Phrased as absolutes, Moore's assertions appear overly broad. If the assertions had been a necessary predicate for the district court's finding of probable cause, we agree that Vasquez's

claim would merit careful scrutiny. Compare United States v. Avers, 924 F.2d 1468, 1479 (9th Cir. 1991) (in evaluating affidavit supporting probable cause for search, court may rely on conclusions of experienced officers regarding where evidence of a drug crime is likely to be found) with Nicacio v. I.N.S., 768 F.2d 1133, 1138-39 (9th Cir. 1985) (noting that, even in the reasonable suspicion context, an officer's inferences must "flow from objective facts and be capable of rational explanation," and that"[w]hile an officer may evaluate the facts supporting reasonable suspicion in light of his experience, experience may not be used to give the officers unbridled discretion . . ."). However, because the district court expressly ruled that there was probable cause regardless of the merits of Moore's assertions, a conclusion

with which we agree, we hold that the district court did not abuse its discretion in failing to hold an evidentiary hearing.

C. The Arrest of Vasquez and Saltaris and the Search of the Truck

We review de novo the district court's denial of a motion to suppress. United States v. Khan, 993 F.2d 1368, 1375 (9th Cir. 1993). "Probable cause exists when, at the time of arrest, the agents know reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1296 (9th Cir. 1988). Probable cause is to be determined by looking at the totality of the circumstances, United States v. Cortez, 449 U.S. 411, 417 (1981), and at the collective knowledge of

the officers involved, United States v. Bertrand, 926 F.2d 838, 844 (9th Cir. 1991).

The government presented declarations from three surveilling officers in opposition to Vasquez's and Saltaris' motion to suppress. The government claims that the facts set forth in the declarations, even without the disputed conclusions of Special Agent Moore, were sufficient to establish probable cause. We agree.

A number of the factors relied on by the district court have been deemed relevant to determinations of probable cause in previous cases. Thus, this court has deemed relevant the fact that tractor-trailers sat empty in a parking lot, see United States v. Mejia, 953 F.2d 461, 464 (9th Cir. 1991); that suspects used pay-phones, see United States v. Del Vizo, 918

F.2d 821, 826 (9th Cir. 1990); that suspects appeared to be visually scanning their surroundings, see United States v. Bernard, 623 F.2d 551, 559-60 (9th Cir. 1979); and that boxes were loaded into a commercial vehicle in a motel parking lot, see Mejia, 953 F.2d at 464, United States v. Ocampo, 937 F.2d 485, 490 (9th Cir. 1991). The officers here, moreover, knew from the beginning of their surveillance that Saltaris was a former DEA informant who had registered at the lodgings under a false name.[3] After two days of continuous surveillance in which officers observed the men engaging in a number of activities consistent with narcotics trafficking, they then observed the "car switch": the

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[3] Although neither counsel provided a clear answer in response to questioning at oral argument concerning when the officers first learned that Saltaris had been a DEA informant, the record is clear that the officers were aware of it from the time that they conducted the background check in the first hours of their surveillance.

departure and quick return of Vasquez in the Sentra, the unloading of the boxes from the Sentra into the truck, and the immediate departure of the men in the truck with their luggage, leaving the Sentra behind. We conclude that, when viewed as a totality, this evidence is sufficient to sustain a finding of probable cause.

D. The Arrest and Search of Gonzalez-Perez

Gonzalez-Perez was stopped while hurrying across the street, shortly after he had been observed on foot approaching and circling the load car in the motel parking lot with another man. A number of the items seized from him at the time of his arrest subsequently were used against him at trial. Gonzalez-Perez claims that the arrest and search were made without

probable cause.[4]

Gonzalez-Perez contends that his only connection with the crime, that he was seen approaching and circling the load car with Valencia, the man who eventually got in the car and drove it away, did not give the police cause to arrest him. See Ybarra v. Illinois, 444 U.S. 85, 93 (1979) (noting that probable cause must be particularized with respect to the person seized); United States v. Robertson, 833 F.2d 777, 783 (9th Cir. 1987) ("It is insufficient to point to the defendant's mere proximity to others independently suspected of criminal activity."). Although we might agree if the facts implicating Gonzalez-Perez were limited to

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[4] In a point-heading in his brief, Gonzalez-Perez also appears to contest the search of the truck, but, having claimed no legitimate expectation of privacy in the truck, Gonzalez-Perez lacks standing to assert this claim. See discussion of Saltaris' standing supra.

his proximity to Valencia, the record establishes that the government had significant additional reasons for making the arrest.

Prior to the arrest of Gonzalez-Perez, the surveilling officers knew that "someone" involved in the conspiracy would be coming to pick up the load car. Contrary to Gonzalez-Perez's contention, we believe that this information gave the officers reason to be highly suspicious of anyone who directly approached the load car, whether he arrived alone or accompanied by another person. Agent Moore saw Gonzalez-Perez circling and looking around carefully in the vicinity of the load car together with Valencia, and then saw him break into a near run when a police car began to tail Valencia. We conclude that the totality of the evidence is sufficient to sustain a

finding of probable cause. Accordingly, we hold that the district court did not err in denying Gonzalez-Perez's motion to suppress.[5]

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[5] Gonzalez-Perez points to what appear to be two factual misrepresentations by the government. The government claims that, at the time of Gonzalez-Perez's arrest, Moore already had received word from Agent Bernhard that Vasquez had revealed that he picked up the Sentra from "three male latins." The government thus implies that at the moment when Moore saw Gonzalez-Perez walk into the parking lot, Moore had strong reason to believe that Gonzalez-Perez walk into the parking lot, Moore had strong reason to believe that Gonzalez-Perez was one of the "latins" already identified by Vasquez as having been associated with the car. The government's claim, however, is contradicted by the declaration of Agent Bernhard. Bernhard testified that Vasquez only revealed to him the information about the "three male latins" at about the same time that Bernhard was informed by another officer that Gonzalez-Perez and two other suspects already had been arrested in the vicinity of the load car and already had been taken to a station (implying that at least a few minutes had passed since the arrests). The declaration of Bernhard thus strongly suggests that Gonzalez-Perez was arrested before Vasquez ever told Bernhard about the "three latins." The government also appears to mischaracterize the record when it claims that Gonzalez-perez started to run when, looking in the direction of the Sentra, he "saw the marked police car activate its lights to stop Valencia." The declaration of Moore, the only e idence the government submitted in opposition to Gonzalez-Perez's motion to suppress, does not mention any activation of

## II. SALTARIS' CHALLENGES TO THE TRIAL COURT'S RULINGS

Saltaris claims that a number of errors were made during his trial, each sufficient to warrant reversal. Saltaris asserts the following claims: A) the trial court erred when it allowed the jury to hear that Saltaris previously had been a DEA informant; B) the prosecution engaged in misconduct when it elicited testimony from a witness indicating that Saltaris had engaged in plea bargain negotiations; C) Saltaris received ineffective assistance of counsel when his counsel failed to move for a mistrial upon

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**lights, and only notes that Gonzalez-Perez began hurrying when he saw the marked car following Valencia. These misrepresentations are not consdered and do not affect our conclusion that the officers had probable cause to make the arrest.**

hearing the reference to the plea negotiations and when counsel failed to call certain witnesses; and D) the jury's verdicts were not supported by the evidence. These claims are addressed in separate sections below.

A. Admission of the Prior Acts Evidence

At trial, the court allowed the government to introduce evidence that Saltaris had served as an informant for the DEA for two months in 1989. The government sought to introduce the evidence in order to undermine Saltaris' contention that he did not know what was in the boxes that he had helped Vasquez load into the truck. As an informant in 1989, Saltaris had introduced a DEA agent to a prospective purchaser of cocaine, and had provided information relating to the interstate transportation of cocaine by tractor-trailer. In particular, Saltaris

had provided information relating to the secret storage of cocaine in trucks transporting vegetables. Over Saltaris' objection, the court ruled that the evidence was proper because it would tend to show that Saltaris was knowledgeable about cocaine trafficking by truck, and because its probative value outweighed its prejudicial effect.

The admission at trial of prior acts under Rule 404(b) is reviewed for abuse of discretion. United States v. Mundi, 892 F.2d 817, 820 (9th Cir. 1989), cert. denied, 498 U.S. 1119 (1991). This court applies a four-part test to determine whether evidence was properly admitted under Rule 404(b): 1) sufficient evidence must exist for the jury to find that the defendant committed the other acts: 2) the other acts must be introduced to prove a material issue in the case: 3) the other

acts must not be too remote in time: and 4) if admitted to prove intent, the other acts must be similar to the offense charged. See United States v. Avers, 924 F.2d 1468, 1472-73 (9th Cir. 1991) (citations omitted). To prove the requisite logical connection, the government "`must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." United States v. Mayans, No. 92-50530, slip op. 1603, 1616 (9th Cir. Feb. 9, 1994) (quoting United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982)).

Saltaris contends that the fact that he had been an informant was not a "bad act" and so was not within the contemplation of Rule 404(b) and that, even if the Rule allows for admission of

evidence of benign acts, Saltaris' acts as a DEA informant were not at all similar to the acts he was charged with in this case. Saltaris also contends that the prejudicial effect of admitting the evidence far outweighed its probative value.

Saltaris' first contention is without merit. Because Rule 404(b) is phrased in the disjunctive--it allows for introduction of evidence of "crimes, wrongs, or acts' -- evidence of innocent conduct, as long as it is probative, is admissible under the Rule. See, e.g., United States v. Devin, 918 F.2d 280, 286 (1st Cir.; 1990) (stating that disjunctive terminology "shows unmistakably that Rule 404(b) reaches conduct which is neither criminal nor unlawful so long as the conduct which is neither criminal nor unlawful so long as the conduct is

probative of, and revelatory as to, a permitted purpose"); United States v. Harrell, 737 F.2d 971, 978 (11th Cir. 1984), cert. denied, 470 U.S. 1027 (19850 (lifestyle and non-criminal practices of motorcycle club members admissible as relevant to motive and means of conspiracy); see also 2 Weinstein's Evidence, 404 [08] at 404.57 (1990) ("conduct that is neither criminal nor unlawful is included if it sheds light on the defendant's character and is relevant to something other than propensity").

We also agree that the evidence satisfied the four-part test for admissibility. It is uncontested that Saltaris did the act (that he served as a DEA informant), that the act was not too remote in time, and that it was introduced to prove a material issue in dispute (whether Saltaris knew the boxes contained

cocaine). Saltaris claims, however, that his acts as a DEA informant were not sufficiently similar to those for which he was charged to warrant admission of the evidence. Although providing information to a government official in order to assist in enforcement of the law is different from being involved in a conspiracy to distribute cocaine, the knowledge underlying the prior act -- that commercial trucks were being used to ship cocaine clandestinely -- is similar. Cf. United States v. Ramirez-Jiminez, 967 F.2d 1321, 1326 (9th Cir. 1992) ("When offered to prove knowledge . . . the prior act need not be similar to the charged act as long as the prior act was one which would tend to make the existence of the defendant's knowledge more probable than it would be without the evidence.").

Finally, although introduction of the

evidence undoubtedly was prejudicial to Saltaris to some extent, we cannot say that the district court abused its discretion in finding that the probative value of the evidence outweighed the prejudicial effect.[6]

B. Prosecutorial Misconduct

One of the government witnesses, Agent Bernhard, had been present during a charge negotiation session with Saltaris on January 30, 1992, one week after the

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[6] One of the rationales for admission of the evidence articulated by the district court was improper. In concluding that the evidence was relevant, the district court commented to counsel that it would show that Saltaris "could be now a skilled law breaker. . . The trial seems to be the best educator of people who go back." Although this passage is ambiguous, the court seems to have based its decision at least in part on the fact that the evidence would allow the jury to draw an inference that Saltaris has a propensity to violate the law. This is precisely the inference for which the evidence may not be used. See, e.g., United States v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979). As described above, hoever, the district court's comments to counsel do not constitute reversible error because, as the district court properly instructed the jury, the evidence was admissible to show knowledge.

arrest. Although the government put Bernhard on the stand, it was defense counsel who, on recross, first queried the witness about the purposes of the January 30 discussions. Over government objection, defense counsel asked whether "one of the purposes of the meeting [was] to give Mr. Saltaris an opportunity to explain. . . that he had nothing to do with the cocaine." the apparent intent of Saltaris' counsel was to elicit testimony from Bernhard to the effect that, during tie January 30 discussion, Saltaris had denied having any knowledge as to what was in the boxes, thereby casting doubt on the credibility of the officers who claimed that Saltaris admitted to knowing that there was cocaine in the boxes on the night of his arrest. In his testimony, however, Bernhard rebuffed defense counsel's questions, and suggested that

Saltaris' guilt or innocence was not even a topic of discussion. On redirect, the prosecutor asked for clarification of the purpose of the January 30 meeting. Bernhard responded: "I believe Saltaris was attempting to cooperate for a lesser sentence." Saltaris' counsel did not object to this statement.

Saltaris claims that, by eliciting the testimony regarding the purpose of the January 30 meeting, the prosecutor violated Fed. R. Crim. P. 11(e)(6), which provides in relevant part that evidence of "any statement made in the course of plea discussions with an attorney for the government that does not result in a plea of guilty" is not admissible. Although Rule 11(e)(6) provides that evidence of plea negotiations and statements made in such negotiations should not come before a jury, an exception is recognized where the

defense already has referred to a statement made during plea negotiations. See, e.g., United Sates v. Mezzanatto, 998 F.2d 1452, 1454 (9th Cir. 1993) ("If a defendant introduces a statement made during plea negotiations the prosecution may introd ce other relevant plea negotiation statements so that the jury receives a full account of the issue presented."), cert. granted, 62 U.S.L.W. 3690 (Apr. 16, 1994). By attempting to elicit testimony from Bernhard about one of the purposes of the January 30 meeting, counsel for Saltaris invited the government to pursue the matter. See United States v. Reyes-Alvarado, 963 F.2d 1184, 1187 (9th Cir.), cert. denied, 113 S. Ct. 258 (1992)

Accordingly, we reject Saltaris' claim that the prosecution engaged in reversible misconduct.

C. Ineffective Assistance of Counsel

Saltaris claims that he received ineffective assistance of counsel when his counsel failed to request a limiting instruction or move for a mistrial upon hearing the reference to the plea negotiations. He also claims that his attorney failed to present evidence critical to his defense. As a general rule, this court does not review challenges to the effectiveness of defense counsel on direct appeal. United States v. Laughlin, 933 F. 2d 786, 788 (9th Cir 1991) ("Such an issue is more appropriately reserved for habeas corpus proceedings, where facts outside the record, but necessary to the disposition of the claim, may be fully developed."). The only exception to this rule is when "the defendant's legal representation was so inadequate as obviously to deny him his

sixth amendment right to counsel and the trial court's failure to take notice sua sponte of the problem amounted to plain error." Id. at 789, n.1 (internal quotations omitted).

Because Saltaris' ineffective assistance of counsel claim does not fall within the exception to the general rule against hearing such claims on direct appeal, e decline to address the claim.

D. Sufficiency of the Evidence

Saltaris was convicted of conspiracy to possess and distribute a controlled substance, possession with intent to distribute a controlled substance, and use of a firearm during a drug trafficking offense. Saltaris, who made a motion for judgment of acquittal following the conclusion of the government's case, contends that he should have been acquitted because the government never

produced evidence that he knew there was cocaine in the boxes. Saltaris' claim is without merit.

Evidence presented at trial is sufficient to support a conviction if, viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Ocampo, 937 F.2d 485, 488, (9th Cir. 1991).

Credible evidence as presented to the jury suggesting that Saltaris was instrumental in the conspiracy. The jury was told that Saltaris had accompanied Vasquez. The jury was told that Saltaris had accompanied Vasquez from the east coast and was jointly responsible for transporting the cocaine to New York. The record also showed that Saltaris met with

Gonzalez-Perez shortly before the cocaine was loaded into the truck, and, from this evidence, a jury could have concluded that the men were discussing details of the upcoming cross-country shipment. A reasonable jury also could have concluded that Saltaris knew what was in the boxes based on Saltaris' post-arrest statements. Saltaris' arresting officer testified that Saltaris' sad on the night of his arrest that he could assist in finding the owner of the "stuff" and that he knew someone who could supply up to 3500 kilograms at a time. Finally, Saltaris conceded that the handgun found in his sports bag near the drugs was in his possession.

Accordingly, we conclude that a rational jury could have found Saltaris guilty beyond a reasonable doubt on all counts on the basis of the evidence presented.

## III. GONZALEZ-PEREZ'S CHALLENGES TO THE TRIAL COURT'S RULINGS

Like Saltaris, Gonzalez-Perez claims that a number of errors were made during his trial, each sufficient to warrant reversal. Gonzalez-Perez claims the following: A) the prosecution engaged n misconduct when, in closing argument, he made a number of remarks to the jury outside the scope of the admitted evidence; B) the court displayed partiality to the government that prevented Gonzalez-Perez from obtaining a fair trial; C) Gonzalez-Perez received ineffective assistance of counsel when his attorney failed to present evidence critical to his defense; and D) the jury verdict was not supported by the evidence. Each of these claims is addressed separately below.

### A. Prosecutorial Misconduct

Gonzalez-Perez contends that the prosecution engaged in misconduct when, in its closing argument to the jury, it asserted that several pieces of physical evidence had come from the person of Gonzalez-Perez. Because Gonzalez-Perez's trial counsel did not object to assertions of prosecutor, the allegedly improper statements are reviewed for plain error. See Mitchell v. Goldsmith 878 F. 2d 319, 323-24 (9th Cir. 1989).

Gonzalez-Perez. Because Gonzalez-Perez was one of three men arrested in the vicinity of the load car after the discovery of the contraband in the truck. All three were searched, and the items obtained from them were put in evidence bags. During the testimony of one of the officers, the prosecution established that the various items had come from the defendants, and then sought to establish

that each of the men possessed each other's pager number. Gonzalez-Perez's counsel objected, claiming lack of foundation, but was overruled.. The jury was then dismissed for the day and counsel continued to discuss the admissibility of the evidence with the court. The court explained that although the prosecution had not yet connected up particular piece of evidence to particular defendants, it would receive the evidence because it was relevant "no matter who [what]." The court continued, however, by saying that if the prosecution wanted to pin a particular item on a particular individual, it would have to show more. In remarks directed to the prosecution, the court commented as follows:

> "...frankly it's a waste of time. But if they [defense counsel] hold you to it, you're going to have to produce the man that says, "I took these things

> from this person and put them in this property bag"...you're going to have to connect it up.

The following day, the government did just that. It put on the stand the officer who had placed the items in the evidence bags. That officer testified that she remembered taking items from each of the named defendants the night of the arrests and putting the items in separate bags with separate names tags. She further testified that none of the items was commingled. Because the chain of custody showed that the items were found in Gonzalez-Perez's possession at the time of arrest, the comments made by the prosecution in its closing arguments were proper. See United States v. Harrington, 923 F.2d 1371, 1374 (9th Cir.), **cert. denied** 112 U.S. 164 (1991).

Gonzalez-Perez also contends that the prosecution engaged in misconduct when, in

closing argument, it argued to the jury that there was "no dispute" as to certain testimony of Saravia, the taxi driver who allegedly had driven Gonzalez-Perez and other defendants to a number of locations that night, and who was a key prosecution witness. Saravia testified that he had driven Gonzalez-Perez to the Motel 6 (the prosecution contended at trial that Gonzalez-Perez had conferred with Saltaris regarding the details of the upcoming cross-country transport of the cocaine). Gonzalez-Perez argues that, by saying there was "no dispute" as to this testimony, the prosecution improperly was commenting on Gonzalez-Perez's exercise of his Fifth Amendment right not to testify. Ninth Circuit case law, however, makes clear that, even where the defendant has declined to testify, the government may argue that its proof is uncontested so

long as it is not phrased so as to call attention to the defendant's decision not to testify. see, e.g., United States v. Lopez-Alvarez, 970 F.2d 583, 595-96 (9th Cir.), cert. denied, 113 S. Ct. 504 (1992). Here, as in Lopez-Alvarez, the prosecution made no express reference to the defendant's failure to testify, and did not otherwise implicate the defendant's exercise of his fifth Amendment right. See id. at 596.

B. Judicial Misconduct

Gonzalez-Perez contends that the court made misleading and prejudicial comments. The following facts underlie Gonzalez-Perez's claim. Counsel for Gonzalez-Perez called Officer Moore as a defense witness. Counsel proceeded to ask Moore what he had been told about the remarks made by the taxi driver Saravia. In the face of hearsay objections from the

prosecution, the court advised defense counsel to change the form of its questions. When the government persisted with its objections, the court responded with some impatience that "there's nothing happening here." In the interchange that ensued, the court repeated this admonition twice. When defense counsel indicated to the court out of the jury's presence that he thought the court's statements might be construed as directed to the value of the testimony of the witness, the court explained that its remarks were addressed to what it saw as the futility of the objections of the government. Cognizant of defense counsel's concern, however, the court suggested that it issue a curative instruction to rectify any possible misunderstanding, and defense counsel approved of the phrasing that the court said it would use. When the trial

resumed, the court instructed the jury in relevant part as follows:

> I want to be crystal clear about what [I] meant. I don't ever comment on a witness' testimony or the significance of that testimony from either side. That's your job, that's not mine. All I was really trying to convey was the thought that I wasn't really grasping what the government's objection was, but I thought as long as everybody had a chance to ask their questions, it was going to probably wash it. but I was not, and I trust nobody would have taken it as a comment to either side on the significance of the testimony being given.

Although Gonzalez-Perez contends that even this curative instruction was flawed because the court used the ambiguous phrase "wash out," it is clear that the prejudice to the defendant, if any, was de minimis. The court acted to rectify any improper impression that its remarks might have created, and the court's actions certainly did not rise to the level of

judicial misconduct. See Kennedy v. Los Angeles Police Dep't, 901 F.2d 702,709 (9th Cir. 1989) (reversal on the basis of judicial misconduct is appropriate only where the trial judge manifests actual bias or, through his actions during the trial, creates an abiding impression of partiality).

C. **Ineffective Assistance of Counsel**

Gonzalez-Perez claims that he received ineffective assistance of counsel when his attorney failed to call as a witness co-defendant Vasquez, who might have testified that he never met with Gonzalez-Perez, and when his attorney failed to call for a mistrial after alleged misconduct by the prosecution in its closing arguments. Because Gonzalez-Perez's claim, like Saltaris' claim, see supra, does not fall within the exception to the general rule against hearing such

claims on direct appeal, we decline to address the claim.

D. **Sufficiency of the Evidence**

Gonzalez-Perez claims that the evidence was not sufficient to convict him on either of the charges against him. Gonzalez-Perez was found guilty of conspiracy to possess and distribute more that five kilograms of cocaine, and of knowingly being in possession of more than five kilograms of cocaine with intent to distribute.

The prosecution produced ample evidence to support the convictions. Evidence found on Gonzalez-Perez's person at the time of his arrest linked him to his co-conspirators (among other items, he had the pager number of another defendant, plane tickets for New York, and a slip of paper with a sum $200,000 written on it), and he conceded that he had lied to the

arresting officers when he denied knowing the other two suspects who were arrested with him near the Motel 6 parking lot. Credible evidence also showed that Gonzalez-Perez had stayed in a hotel with another defendant from January 20 to January 23, 1993, the days immediately preceding the arrests: that he had met with Saltaris just prior to the delivery of the cocaine (the jury could have inferred from the evidence that the two were discussing the details of the upcoming shipment of the cocaine); and that Gonzalez-Perez was one of three men that Vasquez met when he picked up the Sentra loaded with the five boxes of cocaine.

Accordingly, we conclude that a rational jury could have found Saltaris guilty beyond a reasonable doubt on both counts.

## CONCLUSION

For the reasons stated above, the decision of the district court is affirmed.

AFFIRMED.